No. 1930.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

THE UNITED STATES OF AMERICA,
Appellant,

vs.

MINIDOKA & SOUTHWESTERN RAILROAD COMPANY and UTAH CONSTRUCTION COMPANY,
Appellees.

Brief of Appellant.

Upon Appeal from the United States Circuit Court for the District of Idaho, Central Division.

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This case involves the interpretation of several acts of Congress under a condition of facts in regard to which there is no serious dispute. The principal facts have been agreed upon and stipulated into the record.

The stipulation contains about as concise a statement of these facts as it is possible to give and therefore they are given in the language of the stipulation. The principal points are the following:

Second. (Transcript, page 86)—That the complainant, the United States of America, operating under the provisions of the act of Congress of June 17, 1902 (32 Stat.

L., 388), has constructed and is now operating a certain irrigation project, in the State of Idaho, in the Counties of Lincoln and Cassia, consisting of a diversion dam across Snake River, a reservoir on Snake River and numerous canals, laterals, irrigation ditches and drainage ditches; also an electrical power plant and transmission line, by means of which water is pumped for the irrigation of the lands lying above the gravity canals, all of which said canals, laterals, ditches, transmission lines and irrigation works, including the various canals and laterals hereinafter referred to as being crossed or about to be by the defendant railroad company have been constructed under the authority of the United States, under the provisions of the act of Congress of June 17, 1902 (32 Stat. L., 388).

The Court: Hereinafter referred to?

Mr. Lingenfelter: That is, by the maps attached to the answer, I think.

The Court: Yes, but you are making a stipulation now of the facts.

Mr. Lingenfelter: The matters referred to are as follows: That the mains of the Government canals and laterals to be crossed by the proposed Burley to Oakley branch of the defendant's railroad are as follows, and were constructed on the dates written after each:

Canals and laterals crossed by the Burley-Oakley railroad:

C canal (1st lift), built March and April, 1908.

H canal (2nd lift), built April and May, 1908.

J canal (3rd lift), built May and June, 1908.

H 26 lateral, built June, 1909.

H 26B lateral, built June, 1909.

J 32 G, built September and October, 1909.

J 32 F, built September, October and November, 1909.

J 32 sta. 168, built September and October, 1909.

J 32 E lateral, built May, 1909.

J 32 B lateral, built June, 1909.

J 32 sta. 68, built May, 1909.

J 32, built October, 1909.

Third. (Transcript, page 89)—Under the canals and irrigation system of the complaint, as at present constructed, there is about 130,000 acres of irrigable land.

Fourth. That all the lands under said Minidoka project and the extension thereof are arid in character, and require irrigation to produce agricultural crops thereon, but are productive when irrigated.

Fifth. That the said Government ditches, canals and irrigation works, and the proposed extensions thereof, are the only means for the irrigation of said lands.

Sixth. That the lands, ditches and canals which are being crossed and which are to be crossed, and which are about to be crossed by the defendant's said railroad line from Burley to Oakley are a part of that section of said Minidoka Project which is known as the South Side Minidoka pumping project.

Seventh. That said South Side Minidoka pumping project is under construction and partly in operation, but additional canals, ditches, enlargements, alterations and extensions thereof are necessary for the irrigation of parts of said project.

Eighth. (Transcript, page 290)—That on November 17, 1902, the Secretary of the Interior, by his order dated November 17th, 1902, under the authority of Section 3 of the Act of June 17, 1902, (32 Stat. L. 388) withdrew from entry, except under the homestead law, certain lands be-

lieved to be susceptible of irrigation from said works, and ordered that all lands entered and entries made under the homestead law within the areas so withdrawn should be subject to all the provisions, limitations, charges, terms and conditions of said act of Congress of June 17, 1902, known as the Reclamation Act. Among other lands, the Secretary withdrew, under said withdrawal and order, the following described lands:

The southwest quarter of the southeast quarter of Section 19, Township 10 South, Range 23 East, Boise Meridian.

All of Section 30, Township 10 South, Range 23 East, Boise Meridian.

And the southeast quarter of the southeast quarter of Section 25, Township 10 South, Range 22 East, Boise Meridian.

And all of Sections 1, 11, 12 and 14, in Township 11 South, Range 22 East, Boise Meridian.

Ninth. That all of said above described lands were, at the date of said withdrawal, unentered, unoccupied public lands of the United States.

Tenth. That said order of withdrawal has not been rescinded, nor have said lands been restored nor freed from the conditions or restrictions of the Reclamation Act.

Eleventh. (Transcript, Page 91)—That after the withdrawal of said above described lands, as above set out, the said lands so withdrawn and restricted were entered by various persons under the homestead laws, subject to all the provisions, limitations, charges, terms and conditions of said Reclamation Act above referred to, but said entrymen have not yet made final proof or received patent or final certificate, neither have they yet repaid the United

States any part or installment of the cost of construction of said project.

Twelfth. That the lands shown upon the map attached to the defendant's answer herein as homestead entries are homestead entries made and held subject to the conditions, terms and charges and restrictions of the Reclamation Act.

Thirteenth. That after the withdrawal of the above described lands, as above set out, and the entry thereof by the several entrymen, the defendant railroad company went upon said lands and made surveys for a railroad line across the same from said town of Burley to said town of Oakley, both in Cassia County, Idaho, and has let contracts for the construction thereof, and that said railroad company and its said contractor, the Utah Construction Company, have gone upon said lands and partly constructed said railroad grade and railroad line, and is threatening to continue the same to completion, and will continue the same to completion unless restrained by the order of this Court.

Fourteenth. (Transcript, page 92)—That said railroad construction and threatened construction follows approximately the lines shown on the map attached to the defendant's answer herein.

Fifteenth. That said railroad construction and threatened construction consists of a railroad embankment upon which railroad ties and rails are to be laid, the borrow pits from which the earth is removed to form such embankment, and the grades, cuts and fills which are usual in railroad construction, and also several bridges across the several Government canals and laterals of the South Side Minidoka pumping project.

Sixteenth. (Transcript, page 93)—That said railroad line crosses three of the main canals of said South Side Minidoka pumping project, known as the first lift canal, the second lift canal and the third lift canal, as well as various laterals and smaller ditches.

Seventeenth. That under the provisions of said Reclamation Act of June 17, 1902, the complainant has expended in excess of $1,300,000.00 in the construction of the irrigation works for the irrigation of the land lying under said South Side Minidoka pumping project, a portion of which is the land above described, which is now being taken possession of, excavated and thrown up into a railroad grade by said defendant railroad company.

Eighteenth. That no portion or installment of the cost of construction of said project has been returned or paid to the United States.

Nineteenth. That the said lands now being occupied and excavated by said railroad company as a railroad grade are in their natural condition well suited for irrigation and cultivation.

Twenty. (Transcript, page 94)—That by said excavation and the construction of said railroad grades, and the digging out of said borrow pits said lands now being occupied and graded into a railroad grade are rendered unsuitable and worthless for irrigation and agricultural purposes.

Twenty-one. That it is not practical to use for agricultural and irrigation purposes the lands so occupied by said railroad company during its said occupation and use thereof for railroad purposes, and that said lands could not be restored to a suitable condition for agricultural and irrigation purposes without considerable expense in

leveling down said railroad embankment and filling said borrow pits, which expense in many cases would be greater than the value of the land in question.

Twenty-two. That said defendant railroad company has surveyed its said railroad line on and across three irrigation canals constructed under the authority of the United States, under the provisions of the Reclamation Act of June 17, 1902, and that said defendant railroad company is threatening to and is about to go upon and across said irrigation canals and to construct its railroad line and bridges upon and across the same, as well as across several intervening Government laterals and smaller ditches.

Twenty-three. That said proposed railroad line will cross said Government's first lift canal at approximately the point shown on the map attached to the defendant's answer herein, in lot 3 of section 30, township 10 south, range 23 east, Boise meridian.

Twenty-four. That said proposed railroad line will cross said Government's second lift canal at approximately the point shown on the map attached to the defendant's answer herein, in the southeast quarter of the northeast quarter of section 36, township 10 south, range 22 east, Boise meridian.

Twenty-five. (Transcript, page 95)—That said proposed railroad line will cross said Government's third lift canal at approximately the point shown on the map attached to the defendant's answer herein, in the northwest quarter of the southeast quarter of section 14, township 11 south, range 22 east, Boise meridian.

Twenty-six. That the reclamation homestead entries

referred to above were made on the dates shown on the map attached to the defendant's answer herein.

Mr. Clark: (Transcript, page 96)—That is a matter I prefer to put in as a part of my case.

Mr. Lingenfelter: We will want you to show that; we don't object to who shows it in the record.

That the reclamation homestead entries referred to above were made on the dates shown on the map attached to the defendant's answer herein. That is your own showing.

Mr. Clark: That is the fact.

Mr. Stoutemyer: (Transcript, page 98)—That the railroad company is about to and will fence its proposed railroad on both sides down to the water's edge of the Government canals, and that it is necessary for the ditch riders and ditch tenders of the Government canal to pass up and down the bank of the canal at frequent intervals, and that in times of threatened break or leak in the canal it would be disastrous to the Government property if they were delayed or hindered in making such crossings and going up and down the banks of the canal to make necessary repairs and to distribute the water.

Is there any objections to that?

Mr. Clark: No, I think not.

I now offer in evidence Defendant's Exhibit No. 1 (Transcript, page 109), it being exemplifications or certified copies of papers filed in the office of the Secretary of the Interior by the Minidoka & Southwestern Railroad Company, showing compliance with the act of March 3, 1875, for the purpose of obtaining the benefit from that act over the lands in question for the purpose of a right of way. They show a letter signed, as I recollect it now,

by the Acting Secretary, Pierce, to the effect that they are in due form, and, as I understand, recommending them for approval. The position that we would take in that matter is that this certificate that they are in due form and in full compliance with the act would compel their approval by the Secretary of the Interior, that the law would give him no discretion, if they are in compliance.

Mr. Lingenfelter: The plaintiff objects to the introduction of Defendant's Exhibit 1, for the reason that no plan or profile of the route has been filed with the Secretary of the Interior, and for the further reason that the Secretary of the Interior has not approved the exhibits.

Mr. Clark: The last amendment, if the Court please, insofar as it has been passed upon by the Secretary of the Interior, is shown here.

The Court: These don't purport to show the profile?

Mr. Clark: No.

The Court: The objection is overruled.

Mr. Lingenfelter: Note an exception.

Mr. Clark: (Transcript, page 120)—I will say that Mr. Robinson just informs me that no conveyance, no actual conveyance, has been procured for the south half of section 14. He says that the man in possession of it made no objection, and it was the understanding that settlement would be made with him later, when they get together, that the men had that understanding. Now the only thing I could do, as I understand it, would be to bring some person here who knows that that understanding was had between those parties. I don't know but what you might agree that that was the fact upon Mr. Robinson's statement.

ARGUMENT.

The sequence of events is that the lands in question were withdrawn by the Secretary of the Interior for irrigation purposes on November 17, 1902, and thereafter the project was approved and the works actually constructed by the Government at a cost of over $1,300,000.00, for the payment of which the land in question is bound, the Government retaining the title to the land until payment in full is made and retaining title to the works until further act of congress.

After the lands were withdrawn for this purpose and in many cases after the ditches and canals in question had been actually constructed by the Government, the lands were entered by reclamation homestead entrymen subject to all the terms and conditions of the Reclamation Act and at a still later date defendant railroad company has come upon the ground and has sought to appropriate to its own use a portion of the irrigable area of the project and to destroy the land in question for the agricultural and irrigation purposes for which it was withdrawn under the second form of the Reclamation Act.

The contention of the company is that it may appropriate and destroy such portion of the irrigable area of the Minidoka project as it may elect upon a mere showing that it has satisfied the demands of a part of the entrymen who are interested and is negotiating with others without having satisfied any of the demands of the Government nor reimbursed the Government for any part of its expenditure on account of this land, and that the Government has no remedy.

The Secretary of the Interior was unwilling to allow such an appropriation and destruction of a portion of the

project except upon certain conditions and stipulations which he considered necessary to the protection of the Government's interest in the project, and upon the refusal of the company to sign the stipulation the Secretary declined to approve the company's right-of-way profile and application under the act of March 3, 1875, and caused this action to be brought by the legal representatives of the Government to enjoin further depredations upon the Government property involved.

The Acts of Congress to be construed in this case are the following:

Sec. 2288 R. S.:

> "Any bona fide settler under the pre-emption homestead, or other settlement law shall have the right to transfer *by warranty against his own acts*, any portion of *his* claim for church, cemetery or school purposes, or for right-of-way for railroads, telegraph, telephones, canals, reservoirs or ditches for irrigation or drainage across it, and the transfer for such public purposes shall in no way vitiate the right to complete and perfect the title to the claim."

And also in this connection the Act of Congress of June 17, 1902 (32 Stat. L. 388), commonly known as the Reclamation Act.

Section 1 of the Reclamation Act provides:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all moneys received from the sale and disposal of public lands in Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington and Wyoming, beginning with the fiscal year ending June 13th, 1901, including

the surplus of fees and commissions in excess of allowances to registers and receivers, and excepting the 5 per centum of the proceds of the sales of public lands in the above States set aside by law for educational and other purposes, shall be, and the same are hereby reserved, set aside, and appropriated as a special fund in the Treasury to be known as the "reclamation fund," to be used in the examination and survey for and the construction and maintenance of irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semi-arid lands in the said States and Territories, and for the payment of all other expenditures provided for in this Act."

Section 2 of the Reclamation Act provides:

"That the Secretary of the Interior is hereby authorized and directed to make examinations and surveys for, and to locate and construct, as herein provided, irrigation works for the storage, diversion and development of waters, including artesian wells, and to report to Congress at the beginning of each regular session as to the results of such examinations and surveys, giving estimates of cost of all contemplated works, the quantity and location of the lands which can be irrigated therefrom, and all facts relative to the practicability of each irrigation project; also the cost of works in process of construction, as well as of those which have been completed."

Section 3 of the Reclamation Act provides:

"That the Secretary of the Interior, shall before giving the public notice provided for in Section 4 of this Act, withdraw from public entry the lands required for any irrigation works contemplated under the provisions of this Act, and shall restore to public entry any of the lands so withdrawn when, in his judgment, such lands are not required for the purposes of this Act; and the Secretary of the Interior is here-

by authorized, at or immediately prior to the time of beginning the surveys for any contemplated irrigation works, to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from said works: *Provided,* That all lands entered and entries made under the homestead laws within areas so withdrawn during such withdrawal shall be subject to all the provisions, limitations, charges, terms, and conditions of this Act; that said surveys shall be prosecuted diligently to completion, and upon the completion thereof, and of the necessary maps, plans, and estimates of cost, the Secretary of the Interior shall determine whether or not said project is practicable and advisable, and if determined to be impracticable or unadvisable he shall thereupon restore said lands to entry; that public lands which it is proposed to irrigate by means of any contemplated works shall be subject to entry only under the provisions of the homestead laws in tracts of not less than forty nor more than one hundred and sixty acres, and shall be subject to the limitations, charges, terms, and conditions herein provided: *Provided,* That the commutation provisions of the homestead laws shall not apply to entries made under this Act."

Section 4 of the Reclamation Act provides:

"That upon the determination by the Secretary of the Interior that any irrigation project is practicable, he may cause to be let contracts for the construction of the same, in such portions or sections as it may be practicable to construct and complete as parts of the whole project, providing the necessary funds for such portions or sections are available in the reclamation fund, and thereupon he shall give public notice of the lands irrigable under such project and limit of area per entry, which limit shall represent the acreage

which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question; also of the charges which shall be made per acre upon the said entries, and upon lands in private ownership which may be irrigated by the waters of the said irrigation project, and the number of annual installments, not exceeding ten, in which such charges shall be paid and the time when such payments shall commence. The said charges shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably: *Provided,* That in all construction work eight hours shall constitute a day's work, and no Mongolian labor shall be employed thereon."

Section 5 of the Reclamation Act provides:

"That the entryman upon lands to be irrigated by such works shall, in addition to compliance with the homestead laws, reclaim at least one-half of the total irrigable area of his entry for agricultural purposes, and before receiving patent for the lands covered by his entry shall pay to the Government the charges apportioned against such tract, as provided in Section 4. No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one land owner, and no such sale shall be made to any land owner unless he be an actual bona fide resident on such land, or occupant thereof, residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefor are made. The annual installments shall be paid to the receiver of the local land office of the district in which the land is stiuated, and a failure to make any two payments when due shall render the entry subject to cancellation, with the forfeiture of all rights under this Act, as well as of any

moneys already paid thereon. All moneys received from the above sources shall be paid into the reclamation fund. Registers and receivers shall be allowed the usual commissions on all moneys paid for lands entered under this Act."

Section 6 of the Reclamation Act provides:

"That the Secretary of the Interior is hereby authorized and directed to use the reclamation fund for the operation and maintenance of all reservoirs and irrigation works constructed under the provisions of this act: *Provided,* That when the payments required by this act are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior: *Provided,* That the title to and the management and operation of the reservoirs and the works necessary for the protection and operation shall remain in the Government until otherwise provided by Congress."

Section 10 of the Reclamation Act provides:

"That the Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this act into full force and effect."

32 Stat. L. 388.

Approved June 17, 1902.

And if the railroad company makes any serious pretension of having acquired any rights to the land in issue under the act of Congress of March 3, 1875, commonly known as the Railroad Right of Way Act, it may become necessary also to examine the provisions of that act, particularly:

> "Sec. 5. That this act shall not apply to any lands within the limits of any cemetery, park, or Indian reservation, or other lands especially reserved from sale."

For the sake of convenience our discussion of these various matters will be divided into four parts:

First. The railroad company has acquired no rights under the act of March 3, 1875.

(a) It appears that no plat or profile of the road has ever been either filed by the company or approved by the Secretary of the Interior as required by section 4 of that act from all parties desiring to secure the benefits of the act, and that the articles of incorporation and other papers have only been approved as to the regularity of the form.

(b) Even if the profile had been filed and approved no rights could have been acquired thereby by the railroad because the land had been previously segregated from the general body of the public domain by reason of the homestead filings and settlements thereon and was not subject to railroad appropriation under the act of 1875.

(c) Even if the profile had been filed and approved and the land had not been segregated by reason of the homestead entries, no rights could have been acquired by the railroad company under the act of 1875 because the land had been previously withdrawn under the second form authorized in the Reclamation Act for the accomplishment of a Government purpose authorized by law, and is excluded from railroad appropriation under the act of 1875 by section 5 of that act:

> "Sec. 5. That this act shall not apply to any lands within the limits of any cemetery, park, or Indian reservation, or other land especially reserved from sale."

Second. That the only title which the railroad company has acquired to the land in issue is a conveyance from a reclamation homestead entryman under an act of

Congress which authorizes a settler under the homestead law to transfer a portion of *his* claim *by warranty against his own acts.* It it obvious from the express provisions of this statute that it was not intended to extinguish the rights and title of the United States or to deny to the United States any appropriate action for the protection of its title and interest in the land. It was merely intended to provide a means by which a portion of the settlers' interest might be extinguished without voiding the entire claim.

Third. With respect to that portion of the withdrawn area which is located in the south half ($S\frac{1}{2}$) of section fourteen (14), township eleven (11) south, range twenty-two (22) east, we will urge the following objection in addition to those set out in part two: The statute authorizing the transfer of a portion of the settlers' interest, authorizes the transfer only in a particular way, that is, "by warranty against his own acts." It is admitted that no such conveyance has been received from the settlers in the south half of section 14, and, indeed, no conveyance at all. As to this tract of land the railroad company has no shadow of a title not even against the settlers, much less against the Government.

Fourth. The title of the Government to that portion of the withdrawn land occupied by its canals and ditches and the embankments and appurtenances thereof is an absolute fee simple title and with respect to this part of the land in issue the Government has the same absolute undivided right of possession and title which belongs to a private owner of a fee simple estate. Its title is not a mere easement. When it is shown that the Government's title to the land occupied by its canals is a title

in fee and that the land is reserved for a Government purpose authorized by law, it must be admitted that no railroad company has authority to take possession of such property and build fences and bridges and railroad grades and other structures thereon and occupy the property for a railroad line upon a mere showing that it does not intend to prevent the flow of the water in the ditches.

Part First, Division (A).

The language of Section 4 of the Act of 1875 is positive and unconditional in requiring the filing of the profile by all parties desiring to secure the benefits of the Act. It can not be assumed that Congress intended to make the law a laughing stock by giving to those who refuse or neglect to comply with its provisions the same rights as if they had complied. Moreover, it is only after the approval of the profile that such lands are disposed of subject to the right-of-way. The conclusion is obvious that before approval they are not subject to such right-of-way. This is a matter which is properly left to the discretion of the Secretary.

Oregon vs. Hitchcock, 202 U. S. 60.

Part First, Division (B).

That after homestead entry the land is excluded from railroad appropriation under the Act of 1875 has been settled by the Supreme Court of the United States and is not now open to controversy.

"The claim of a homestead or pre-emption entry made at any time before filing a map of definite location of a railroad prevents the lands covered by such claim from

passing to such railway under its land grant, even though such entry be subsequently abandoned."

Shiver vs. United States, 159 U. S. 491.

Under the Acts granting lands to aid in the construction of a line of railroad the claim of a homestead or pre-emption entry made at any time before the map was filed attached, within the meaning of those statutes; and no land to which such right had attached came within the grant.

Where homestead right had attached to the land before the railroad grant, it was excepted out of the grant as much as if it had been excluded therefrom by metes and bounds.

Sioux City & I. F. Co. vs. Griffey, 143 U. S. 32.

Kansas P. R. Co. vs. Dunmeyer, 113 U. S. 629.

Part First, Division (C).

Lands withdrawn under the second form of the Reclamation Act are "especially reserved from sale" and therefore belong to the classes of land which it has always been the policy and intention of Congress to preserve from appropriation and spoliation by railroad companies.

Two forms of withdrawal are authorized by Section 3 of the Reclamation Act. The first is for the purpose of preventing private parties from appropriating the sites which are necessary for the construction of the Government irrigation works. The second is for the purpose of preserving the irrigable area of the project without which the works would be useless and worthless and for the purpose of insuring the Government of full compliance with all the terms and conditions of the Reclamation Act. The second form of withdrawal is just as fully and clearly au-

thorized as the first and is equally necessary. Irrigation works, without irrigable lands, are just as worthless as irrigable lands without the necessary works.

It cannot be denied that such lands are withdrawn by express authority of law for a Government purpose fully authorized by law, namely, for irrigation and reclamation.

Lands withdrawn for any Government purpose have always been regarded as reserved from sale and from appropriation by railroad companies.

> "An act of Congress granting land to a State in aid of railroad construction will not be considered as including lands theretofore legally appropriated for any purpose, although no reservation is made of it."
>
> Leavenworth L. & G. R. Co. vs. United States, 92 U. S. 733.

> "Whenever a tract of land has been appropriated to the public use it is severed from the mass of the public domain, and subsequent laws of sale are not construed to embrace it, though they do not in terms except it."
>
> Wilcox vs. Jackson, 13 Pet. 498.

Lands which may be entered only under the homestead law particularly if it be the homestead law subject to the terms and conditions of the Reclamation Act, are not subject to "sale" but are "reserved from sale." The only thing in connection with the ordinary homestead which in any way resmbles a sale is the commutation privilege. This is not a part of the homestead law proper, but is a survival of the pre-emption law which has been engrafted upon the homestead law. But where the entry is a reclamation homestead entry the commutation privilege has

been entirely eliminated and the last vestage which could in any way be regarded as a sale, has disappeared.

It certainly will not be assumed that Congress used the word "sale" for no purpose at all or to convey a meaning different from and contrary to its common, well known and generally accepted meaning.

This is particularly true in view of the fact that at the time the act of 1875 was passed this term had been clearly and precisely defined by the Supreme Court of the United States in language which cannot be misunderstood.

The following is the language of the Supreme Court on this issue:

> "We now proceed to the other points certified. Upon the first of them, relating to the premises having been parted with by Clarke to DeGrasse, upon a consideration other than cash, we remark, *that sale is a word of precise legal import both at law and in equity. It means at all times a contract between parties, to give and pass rights of property for money, which the buyer pays or promises to pay to the seller for the thing bought and sold.* No departure from the manner in which a sale is directed to be made, either under a judgment at law or a decree in equity, is permitted."
>
> Williamson vs. Berry, 8 How. 544.

An examination of the Public Land Statutes of the United States shows that Congress has uniformly used the term "sale" in its proper and generally accepted meaning as defined by the Supreme Court in the case of Williamson v. Berry, and always in connection with a transfer of title under the pre-emption law, the Timber and Stone Act, the desert law, the acts providing for the

sale of abandoned military reservations and isolated tracts and other acts authorizing the transfer of title upon payment of a purchase price. It is notable that where the term sale is used it always refers to a transfer of title in exchange for the payment of a purchase price. The term sale is always used in such cases.

But it is equally noticeable that the term sale is never used in those acts of Congress which authorize and regulate the entry of land under the homestead law, such entries not being regarded as sales but as a gift or bounty from the Government to the settler. This is particularly true of homesteads under the Reclamation Act, from which the commutation clause has been eliminated. The term sale is employed in each of the following acts and always in the sense described above:

In act of June 3, 1878, Ch. 151, 20 Stat. L. 89 (commonly called the Timber and Stone Act).

In act of March 3, 1877, Ch. 107 (19 Stat. L. 377), entitled "An act to provide for the sale of desert lands in certain States and territories."

Sec. 2353 R. S.; Sec. 2354 R. S.; Sec. 2355 R. S.; Sec. 2356 R. S.; Sec. 2357 R. S.

Sec. 2 of act of May 18, 1898, Ch. 344; Stat. L. 418; Sec. 2358 R. S.; Sec. 2359 R. S.; Sec. 2360 R. S.; Sec. 2365 R. S.; Sec. 2381 R. S.

In those acts authorizing and governing entries under the homestead law the term sale is never used, such entries not being considered sales.

Sec. 2289 R. S.; Sec. 2290 R. S.; Sec. 2291 R. S.

Act of June 17, 1902 (32 Stat. 388), Reclamation Act.

Section 2357, Revised Statutes, is particularly interesting, as it furnishes a convenient test for determining whether the lands withdrawn under the Reclamation Act are "offered for sale" or "reserved from sale."

It provides:

> "The price at which the public lands are offered for sale shall be one dollar and twenty-five cents an acre; and at every public sale, the highest bidder, who makes payment as provided in the preceding section, shall be the purchaser; but no land shall be sold either at public or private sale for a less price than one dollar and twenty-five cents an acre; and all the public lands which are hereafter offered at public sale according to law and remain unsold at the close of such public sales shall be subject to be sold at private sale, by entry at the land office, at one dollar and twenty-five cents an acre, to be paid at the time of making such entry: *Provided,* That the price to be paid for alternate reserved lands along the line of railroads within the limits granted by any act of Congress shall be two dollars and fifty cents per acre."

We only need to ask, "Can the lands withdrawn under the second form of the Reclamation Act be purchased at the land office for one dollar and twenty-five cents an acre, or for two dollars and fifty cents per acre?"

Obviously they can not be purchased for that price or for any other price. They are not lands offered for sale, but are lands reserved from sale.

Lands Sold By Congress.

And finally, if any uncertainty ever existed as to what lands are regarded as lands sold by Congress, and what lands are lands reserved from sale, it has been removed by

the decision of the Supreme Court in the case of Iowa vs. McFarland, which is directly in point and unmistakable.

Act of March 3, 1845, c. 76, provided for the admission of the State of Iowa into the Union; and Act April 18, 1818, c. 67, authorizing the admission of Illinois. Both acts declare that 5 per cent of the net proceeds of land lying within the State, and afterwards *"sold by Congress"* shall be reserved and appropriated for certain public purposes of the State. Held that the words, *"Lands sold by Congress"* were limited to public land lying within the State, belonging to the United States, at the time of the admission of the States into the Union, which were actually sold by Congress for a pecuniary consideration, and did not include bounty lands or lands disposed of by the United States in satisfaction of military land warrants.

Iowa vs. McFarland, 110 U. S. 471, 28 L. Ed. 198.

> "A homestead entry is the initial step taken in the land office toward acquiring ownership under the homestead law and precedes the performance on the part of a homestead claimant of the conditions of residence upon and improvement of land which constitutes the real consideration for the transfer of the title, and which are conditions precedent to the vesting of title in the homestead settler."
>
> McCune vs. Essig, 118 Fed. 273, 277 (C. C. A. 122 Fed. 588).

> "That portion which described the qualifications for entry is to be liberally construed, in order that no one be permitted to avail himself *of the bounty of Congress* (under the homestead laws) unless evidently of the classes Congress intended should enjoy that *bounty.*"
>
> Smith vs. Townsend, 148 U. S. 497.

"Now it is argued on the one hand that it is a matter of course for a court of equity to decree a specific performance of a contract for the conveyance of real estate, etc. On the other hand, it is contended *that the homestead is a gift from the Government to the homesteader, conditioned upon his occupation for five years, etc.*

We think the latter reasoning correct."

Anderson vs. Carkins, 135 U. S. 488.

"The homestead is a gift from the Government to the homesteader."

Adam vs. Church, 193 U. S. 515.

It is obvious that the lands withdrawn under the second form of the Reclamation Act are "specially reserved from sale" and belong to the class of lands which it has always been the policy and intention of Congress to preserve from appropriation and spoliation by railroad companies.

Second.

The only possible claim of title which the railroad company can assert to the land in issue is by reason of a deed from a reclamation-homestead entryman to a portion of his (the entryman's) claim by warranty against his (the entryman's) own acts.

It is admitted that prior to entry by the homesteaders and long prior to the initiation or assertion of any claims by the railroad company the lands were withdrawn by formal order of the Secretary of the Interior for a purpose expressly authorized by law, namely, for irrigation and reclamation as a part of a Government reclamation project.

"Whenever a tract of land has once been legally appropriated for any purpose from that moment it be-

comes severed from the mass of public lands, no subsequent law, proclamation or sale will be construed to embrace it or to operate upon it, although no reservation were made of it."

Wilcox vs. Jackson, 13 Pet. 498.

By reason of a conveyance under the following Act of Congress, to wit:

"Any bona fide settler under the pre-emption homestead or other settlement laws shall have the right to transfer *by warranty against his own acts,* any portion of *his* claim for church, cemetery or school purposes, or for right-of-way of railroads, telegraph, telephones, canals, reservoirs or ditches for irrigation or drainage across it, and the transfer for such public purposes shall in no way vitiate the right to complete and perfect the title to the claim."

The railroad company claims to have so far extinguished the Government title and interest that it may take possession of lands withdrawn by authority of law for the accomplishment of a particular Government purpose and entirely destroy their usefulness for the purpose for which they are withdrawn, and that the Government has no remedy either for the protection of its title and interest in the land or for the protection of the value of its irrigation works, which depend upon the preservation of the irrigable area.

Prior to the date of this act any conveyance by a homestead entryman prior to final certificate was considered a fraud on the Government, required perjury in connection with the final proof and therefore invalidated the entire entry. The intention of this Act was to provide a means by which the interest of the settler might be extinguished

in a portion of his entry upon an equitable payment to him of the value of his interest without invalidating the entire entry. It is obvious from the language of the statute itself that it was not intended to extinguish the title of the United States nor to destroy the right of the Government to protect its title and property interest by any appropriate action in court. This is true of the general homestead entry, but it is much more necessary and important in the case of the reclamation-homestead entry. In the case of the ordinary homestead entry, the necessity for the exercise of this power by the Government rarely, if ever, arises, but the fact that it is seldom exercised is no argument against the existence of the power. With respect to the reclamation-homestead entry the situation is entirely different. To hold in such a case that the Government has no standing in court merely because some entryman has given a deed to a portion of *his* (the entryman's) claim by warranty against his (the entryman's) own acts, not only deprives the Government of the power to protect its title and interest in the land but also deprives the Government of the power to protect the value of the irrigation works, in which the Government has invested about sixty million dollars ($60,000,000.00) up to the present time, the preservation of the irrigable land being essential to the usefulness and value of the irrigation works. Prior to the railroad construction and prior to any of the entries in question, this land was withdrawn by a formal order of the Secretary of the Interior expressly authorized by law for the purpose among other things of insuring to the Government this very protection.

It is sought by construction to repeal the restrictive clause placed in the act by Congress, nullify the words,

"by warranty against his own acts" and the words "any portion of *his* claim," and extend the act to include a conveyance not by warranty against the settler alone as provided in the act, but also a valid conveyance against the United States itself, even to the extent of including lands withdrawn for irrigation under the Reclamation Act subject to its charges and restrictions and entries for the irrigation of which the Government has spent many thousands of dollars, no part of which has been returned to the Government.

Under the decisions of the Supreme Court repeatedly affirmed in most emphatic language, it is impossible to extend such a statute by judicial construction or to give it any other construction except a strict construction against the grantee and in favor of the Government. It would be impossible to find more emphatic and unmistakable language than has been used by the Supreme Court in reference to this rule of construction. This rule has been laid down by the Supreme Court of the United States in the case of Mills vs. St. Claire Co., as the established doctrine of that Court in the following language:

> "We deem this general principle not open to controversy; and in regard to so much of the controversy as involves the contract itself, no material difficulty exists as to what principles of law should govern; only two general principles need be invoked in construing the acts of 1819 and 1821, which are: First. That in a grant like this, designed by the sovereign power, making it to be a general benefit and accommodation to the public, the rule is, that if the meaning of the words be doubtful they shall be taken most strongly against the grantee, and for the Government; and

therefore should not be extended by implication in favor of the grantee, beyond the natural and obvious meaning of the words employed; and if these do not support the right claimed it must fall. Such is the established doctrine of this Court."

Mills vs. County of St. Clair, 8 How. 581, 12 L. Ed. 1201.

"Whether the grant be of property franchises or privileges, it is construed strictly in favor of the public; nothing passes but what is granted in clear and explicit terms."

Sutherland Stat. Const. 548, Holyoke Co. vs. Lyman, 15 Wall, 500, 21 L. Ed. 133.

"Where a statute operates as a grant of public property to an individual, or the relinquishment of a public interest, that construction should be adopted which will support the claim of the Government rather than that of the individual."

Slidell vs. Grandjean, 111 U. S., 412, 28 L. Ed. 321.

"Any ambiguity in the terms must operate in favor of the Government."

Sutherland Stat. Const. 548;

Richmond R. R. Co. vs. Louisa. R. R., 13 How. 71, 14 L. Ed. 55;

Grant vs. Leach, 20 La. Ann., 329;

McLerd vs. Burrows, 9 Ga. 213;

Louisville R. R. vs. Kentucky, 161 U. S. 677, 40 L. Ed. 849.

"By a familiar rule every public grant of property or of privileges or franchises, if ambiguous, is to be construed against the grantee and in favor of the pub-

lic; because an intention on the part of the Government, to grant to private persons, or to a particular corporation, property or rights in which the whole public is interested, can not be presumed, unless unequivocally expressed or necessarily to be implied in the terms of the grant; and because the grant is supposed to be made at the solicitation of the grantee, and to be drawn up by him or by his agents, and therefore the words used are to be treated as those of the grantee, and this rule of construction is a wholesome safeguard of the interests of the public against any attempt of the grantee, by the insertion of ambiguous language, to take what could not be obtained in clear and express terms."

Central Transportation Co. vs. Pullman Pal. Car Co. 139 U. S. 24, 35 L. Ed. 55.

"The words of a private grant are taken most strongly against the grantor. But this rule is reversed in cases of public grants. They are construed strictly in favor of the Government on grounds of public policy."

Lewis Sutherland Stat. Cons. par. 548;

Mills vs. St. Clair Co., 8 How. 581, 12 L. Ed. 1201;

Binghampton Bridge, 3 Wall. 51, 18 L. Ed. 137;

Green's Estate, 4 Md. Ch. 439;

United States vs. Arrendonio, 6 Pet. 738-9, 8 L. Ed. 547;

State ve. Bentley, 23 N. J. L. 532, 538.

Commonwealth vs. Roxbury, 9 Gray, 451, 492;

Slidell vs. Grandjean, 111 U. S. 412, 28 L. Ed. 321.

Hannibal R. R. Co. vs. Packet Co. 125 U. S. 260, 271.

Currier vs. Marietta R. R. 11 Ohio St. 228.

Mayor vs. Ohio, etc. R. R. 26 Pann. St. 355.

San Francisco vs. Sharp, 125 Cal. 534, 58 Pac. 173.

Burrows vs. Kimball, 11 Utah, 149, 41 Pac. 719.

Clobe vs. Bellingham Co. 10 Wash. 458, 38 Pac. 1112.

Central Transp. Co. vs. Pullman Co. 139 U. S. 24, 35 L. Ed. 55.

Coosaw Co. vs. South Carolina, 144 U. S. 550, 36 L. Ed. 537.

L. & N. R. R. vs. Kentucky, 161 U. S. 677, 40 L. Ed. 849.

Wisconsin Central vs. United States, 164 U. S. 190, 41 L. Ed. 399.

Long Island Co. vs. Brooklyn, 166 U. S. 685, 41 L. Ed. 1165.

By public notice issued by the Secretary of the Interior the estimated cost of the project is divided and assessed to the irrigable acreage of the project at so many dollars per acre for each acre of irrigable land. If all the irrigable area of the project is preserved, the returns at the rate fixed by public notice will just about make good to the Government its actual cost of construction, which is the intention of the law. But if any considerable part of the irrigable area of the project is destroyed, the Government will lost a part of its construction cost; by a recurrence of such events the fund will become depleted and the intention of the Act would be defeated.

If this company may appropriate one part of the Government project and destroy its usefulness for irrigation purposes, another and yet another may do likewise. Under the same law a private reservoir company may appropriate 10,000 acres of irrigable land in the heart of a constructed

Government project and by packing the soil with standing water and bringing the alkali to the surface may entirely destroy its agricultural value as a part of the Government project. Or if the Government project should happen to be a small one, practically the entire project might be destroyed in this way after the Government has made its investment. Whether the amount taken be large or small the legal principle is the same and the loss to the Government only differs in degree.

If the respondent's contention is correct, it would be held that the Government would have no remedy either to protect its title and interest in its withdrawn lands or to protect the value of its irrigation works even though the entire Government project were being destroyed.

The ridiculousness of this contention is further illustrated when it is considered what its effect would be if such a conveyance were made to a railroad company by a settler on unsurveyed land. This supposition is not at all imaginary for such conveyances are frequently made, and it is held that such settlers have the same rights against railroad companies and the same right to convey under the law for railroad purposes as has the homestead entryman, and the railroad company can not occupy any part of the land included in such a settlement without first extinguishing the right of the settler.

Yet such settlers have no right whatever against the Government if the land is required for Government purposes.

United States vs. Hanson, 167 Fed. 881, and cases there cited.

This case, recently decided by Your Honors, furnishes

a convenient illustration. If the respondent's contention is correct, all that Mr. Hanson needs to do to prevent the construction of the reservoir in issue in that case is to sell a portion of his claim to a railroad company "by warranty against his own acts." Then the railroad company, by purchase from one who has no title against the Government obtains a perfect title against the Government, and the reservoir can not be built because the cost of removing the railroad from the reservoir would be too great to permit the reservoir to be constructed at a reasonable cost.

The only argument advanced in support of the amazing construction of this law which is sought by the railroad company runs something like this:

Unless the railroad company is allowed to destroy the value of this withdrawn land for the purpose for which it is withdrawn, without let or hindrance, upon merely satisfying the demands of the settler, there is no law under which it can secure a perfect title to the desired right-of-way.

Therefore the protection of the Government's rights might, to some extent, conflict with the ambitions of the railroad company. Railroads are beneficial to railroad owners and sometimes to local communities, therefore, it must be the law that the Government has no rights where railroad companies are concerned.

We realize that our position on this question will be considered rank heresy, both by the railroad company and its attorneys, but we must respectfully insist that the Government's claims can not be thrown out of court upon a mere statement by a railroad attorney that the protection of the Government's rights might limit to some extent the ambitions of his company, and that in his opinion the great

railroad monopoly which he represents is a beneficient being that comes down from Heaven on snowy white wings to bestow upon all the people the benefits of "what the traffic will bear."

The argument is as false in fact as it is in law, for there is a clearly defined means fully authorized by express provisions of statute by which absolute titles may be obtained to the land in question free from any reservation whatever. The Secretary of the Interior is as fully authorized to restore the lands withdrawn under the Reclamation Act as he is to withdraw them in the first instance. Upon such restoration the lands would be immediately freed from all the restrictions of the Reclamation Act, patents could be promptly secured under the commutation clause and absolute titles conveyed to the railroad company. But the discretion of determining whether the public interests would best be served by restoring the land in question so that the railroad company may secure an absolute title or of retaining it for the purpose for which it is withdrawn, rests with the Secretary of the Interior, and not with the railroad company nor even with the trial court, and it is not within the province of either the company or the court to substitute its own opinion in regard to what would be the best public policy in regard to such matters, in place of the Secretary's opinion.

> "Again it must be noticed that the legal title of all these tracts of land is still in the Government. No patents or conveyances of any kind have been executed. There has been no finding or adjudication by the Land Department that the lands referred to were swamp or overflowed on March 12, 1860. Under these circumstances it is not a province of the courts

> to interfere with the Land Department in its administration. So far as a grant of swamp lands is claimed it must be held that the grant is in process of administration, and, until the legal title passes from the Government, inquiry as to equitable rights comes within the cognizance of the Land Department. Courts may not anticipate its action or take upon themselves the administration of the land grants of the United States."
>
> Oregon vs. Hitchcock, 202 U. S. 60.

Much less is it within the province of a railroad company or of a court to substitute its individual opinion in regard to the best public policy for the positive enactments of Congress expressed in plain and simple language.

There is nothing ambiguous or uncertain in the Act which authorizes a settler to transfer a portion of *"his* claim," *"by warranty against his own acts,"* and the rule of law which governs its interpretation is equally plain and well settled.

> "We deem this general principle not open to controversy; and in regard to so much of the controversy as involves the contract itself, no material difficulty exists as to what principles of law should govern; only two general principles need be invoked in construing the Acts of 1819 and 1821, which are: First. That in a grant like this, designed by the sovereign power, making it to be a general benefit and accommodation to the public, the rule is, that if the meaning of the words be doubtful, they shall be taken most strongly against the grantee, and for the Government; and therefore should not be extended by implication in favor of the grantee, beyond the natural and obvious meaning of the words employed; and if these do not support the right claimed it must fall. Such is the established doctrine of this Court."

Mills vs. County of St. Clair, 8 How. 581, 12 L. Ed. 1201.

"Public grants convey nothing by implication."

United States vs. De la Maza Arrendondo, 6 Pet. 691.

This principle applies to grants in aid of railroads as well as all others. Any doubts as to the intention or extent of the grant or the intention of the Government are to be resolved in its favor.

Leavenworth L. & G. R. Co. vs. United States, 92 U. S. 733.

To give to this act the interpretation sought by the railroad company would not only require a very great extension "by implication in favor of the grantee, beyond the natural and obvious meaning of the words employed," which is prohibited by the "established doctrine" of the Supreme Court, but it would in fact be necessary to repeal the entire law and to enact in its stead an entirely new and different one by judicial authority.

The argument that a conveyance from the settler by warranty against his own acts is a worthless instrument and the law of no effect unless it is extended to include the rights and title of the Government as well as those of the settler, is so weak that it collapses upon the first reading. It is obvious that it protects the company from the actions and complaints of the settlers and in ninety-nine cases out of a hundred that is all that is necessary, for under ordinary circumstances the Government does not object, but when the company seeks to take possession of land which has been withdrawn for the accomplishment of a particular Government purpose, such as irrigation and reclamation, and to so change the nature and condi-

tion of the land as to render it entirely unsuitable for that purpose, the reason for the objection is plain enough.

Third.

It is admitted that the railroad company has obtained no conveyance from the settlers in the south half ($S\frac{1}{2}$) of section fourteen (14), township eleven (11) south, range twenty-two (22) east.

The statute authorizes a settler to convey a portion of his claim only in a particular way. That is by warranty against his own acts. Not only has the company failed to obtain from the settler any conveyance by warranty against his own acts, but has entirely failed to obtain any conveyance of any nature or kind whatever. Consequently as to this tract of land, the company has no shadow of title whatever not even against the entryman, much less against the Government.

If it can be sustained that a party without any shadow of title can take possession of property belonging to another, appropriate it to his own use and change its condition and character to suit his own fancy, and that the owner of the legal title has no remedy to protect his property interests, then from that moment all rights of property have failed.

The principle involved in this part of the case is so elementary that it is very rarely that courts have been compelled to pass upon it, and when they have done so, they have not considered it necessary to argue the matter at any great length.

> "I am of the opinion that the United States is entitled to its injunction mandatory as to so much of the fence complained of as exists, and prohibitory as

to building any future fences, so far as either of them comes within the following principles: (1) There exists no right in the defendants to build and fence on the lands of the United States. (2) All lands are for this purpose, lands of the United States, so long as the legal title remains in the United States. (3) It is the right of the United States and its duty to protect all such lands from this misuse in cases where there have been any kind of entries, whether of preemption, homestead, or private entry, though the purchase money be paid, so long as the legal title remains in the United States, except where those latter parties build their own fences or give express license to others to do it. In these cases it holds the title in trust and can maintain this bill to remove the fence or prevent its erection. A decree should be entered based on these principles."

United States vs. Brighton Ranch Co. 25 Fed. 465.

The question was also discussed by Justice Brewer in a very able opinion rendered by him while on the Circuit bench in a case of the same name:

"We think, too, an action of injunction is the appropriate remedy, and that an action of ejection would not furnish full protection to the Government. Generally speaking, any encroachment upon the public domain may be restrained or ended by injunction; and in this case it was not the mere fact that the fence is built upon Government land, because such fence operates not only as an entry upon the particular land upon which the fence is built, but also to separtae the enclosed lands from the general body of the public domain. So that we think full and adequate remedy can be obtained only in a Court of Equity, which

reaches the individual and compels him to abandon and desist from any encroachment on the public property."

U. S. vs. Brighton Ranch Co. 26 Fed. 218.

Fourth.

When it is shown that the Government's title to that part of the withdrawn land occupied by the canals and laterals involved in this suit, and their embankments and appurtenances, is an absolute fee simple title, it must be conceded that no railroad company may take violent possession thereof and occupy the same for its own purposes and build fences, railroad grades, bridges and other structures thereon upon a mere showing that it does not intend to obstruct the flow of the water in the ditches. Under the provisions of the act of Congress of August 30, 1890 (26 Stat. L. 391), a right of way is reserved for ditches and canals constructed under the authority of the United States. The provision in question is as follows:

"That in all patents for lands hereafter taken up under any of the land laws of the United States or entries or claims validated by this act west of the one-hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described a right of way thereof for ditches or canals constructed by the authority of the United States."

Act of Congress of August 30, 1890 (26 Stat. L. 391).

Green vs. Wilhite, 14 Idaho 238, 93 Pac. 971.

Green vs. Wilhite, 160 Fed. 755.

There has been considerable argument and some difference of opinion as to whether the right reserved to the Government by this act is a fee or an easement. Undoubt-

edly there are some very strong reasons for believing that it is at least a conditional fee.

That the right of way preserved to the Government for ditches and canals constructed under its authority is a fee title appears from the construction given to the same term in other acts of Congress. Exactly the same term is used in the act of August 30, 1890, (26 Stat. L. 391) with respect to the right reserved to the Government for canals constructed by it as is used in the act of March 3, 1875, with reference to the title to be conveyed to railroad companies for their construction:

> "Sec. 1, act of March 3, 1875, (18 Stat. L. 482). That the *right of way* through the public lands of the United States is hereby granted, etc."
>
> "Act of August 30, 1890, (26 Stat. L. 391). There is reserved from the lands in said patent described, a *right of way* thereon for ditches or canals constructed by the authority of the United States."

The term in each case is right of way. In the case of the Northern Pacific Railroad Company vs. Townsend, 190 U. S. 267, the Supreme Court has held that the right conveyed by this expression is a conditional fee on an implied condition of reverter in the event that the Company ceased to use or retain the land for the purpose for which it was granted. Under the well known rule of construction that all ambiguities in such statutes are to be determined in favor of the Government and against the grantee and that such grants are to be strictly construed against the grantee and reservations therein liberally construed in favor of the Government, the right reserved to the Government by the description *right of way* for ditches or canals constructed by the authority of the United States can not be held to reserve to the United States any less

right than is conveyed to the railroad company by the same descriptive words in the act of March 3, 1875. In other words, the title of the Government to such rights of way certainly can not be held to be anything less than a conditional fee but may and probably is to be held to be something more or better than that. It is certainly a stronger title in this respect, that it is not subject to forfeiture by non-use, as is the title conveyed to the railroad company under the Railroad Act.

But in this case it is not necessary for the Government to rely on any point about which there can be any reasonable difference of opinion and therefore for the purpose of this argument we are willing to concede that the right of way reesrved by the act of August 30, 1890, is an easement as urged by our opponents and to proceed with the argument on that issue.

You may consider the Government's rights under the act of August 30, 1890, as an easement, or, if you like, may disregard the Government's rights under that act altogether, and the Government still has a fee simple estate.

All of the land occupied by the Government ditches was occupied and used by the Government and the ditches and canals actually constructed by the Government long prior to the construction of the railroad line, and in a number of cases the land occupied by the Government ditches was occupied and used by the Government prior to the entry of the settler from whom the railroad company claims title.

Such actual occupation and use by the Government preserves the original Government title to the Government just as effectively as if the land had been withdrawn under the first form of the Reclamation Act, or for an Indian,

or military reservation, or any other purpose authorized by law.

For example, take the first lift main canal, some times referred to as "C canal." The stipulation in regard to this canal is that it was built under the authority of the United States under the provisions of the act of Congress of June 17, 1902, (32 Stat. L. 388) during March and April, 1908, (see paragraph 2 of the stipulation) and that the reclamation homestead entries referred to were made on the dates shown on the map attached to the defendant's answer herein (see paragraph 28 of the stipulation). The map in question shows with respect to the entry of this tract that it was made by Edward R. Guyman, homestead entry No. 03106 on July 12, 1909, and at a still later date he conveyed a right of way to the railroad company. In this case the settler's entry was made over a year after the land occupied by the canal had been actually appropriated and occupied by the Government and the canal actually constructed.

That the original Government title is a fee simple title requires no argument; it is in fact the origin of all fee simple titles in this country, and so far as the first lift canal is concerned, it is evident that the original title has been preserved.

> "Now, that the land in question has been appropriated in point of fact, there can be no doubt for the case agreed states that it had been *used* from the year 1804 until and after the institution of this suit, as well for the purpose of a military post as for that of an Indian agency with some occasional interruption. *Now this is appropriation for that is nothing more or less than setting apart the thing for some particular use.*"

Wilcox vs. Jackson, 13 Peters 498, 512.

Scott vs. Carew, 196 U. S. 100.

It is clear that power to withdraw lands from entry was granted to the Secretary of the Interior in order to prevent appropriation by private citizens *in advance* of the actual occupation and use by the United States, but that the Government is not precluded, irrespective of an order of withdrawal from appropriating the land by actual taking of possession.

The same rule has guided the decisions of the Land Office.

In re Davis, 5 L. D. 376.

"Lands segregated by military occupation. Wilson Davis. The establishment and occupancy of a cantonment by the military authorities, excludes from entry, prior to the formal order of reservation, the land thus appropriated. Acting Secretary Muldrow to Commissioner Sparks, January 20, 1887.

"I have considered the appeal of Wilson Davis from the decision of your office, dated July 25, 1885, holding for cancellation his pre-emption cash entry No. 105 of the W½ of the NW¼ and the N½ of the SW¼ of Section 6, Township 47 North, Range 8 West, N. M. Meridian, made October 2, 1883, at the Gunnison Land Office, in the State of Colorado, so far as the same conflicts with the military reserve, as shown by the supplemental township plat approved July 15, 1884.

"The facts appear to be substantially set forth in the decision appealed from, and it is shown that the land in controversy was within the limits of the Ute Indian reservation, formerly occupied by the White River and Uncompahgre Ute Indians in Colorado, which was declared to be public land of the United States and subject to disposal for cash under existing

laws, by act of Congress approved July 28, 1882, (22 Stat. 178).

"It appears that the township plat of survey embracing said land was filed on March 23, 1883; that Davis filed his pre-emption declaratory statement for said tracts on July 9, 1883, alleging settlement March 27, 1882, and cash certificate was issued upon his final proof on October 2, 1883. It further appears from the statement in said decision and from an inspection of the records of your office that the land in controversy was occupied by the United States military authorities in 1804 as a cantonment.

"In response to an inquiry from your office, the Secretary of War, on November 18, 1882, transmitted the report of the Judge Advocate General relative to the status of the land within the late Uncompahgre reservation, reported as having been laid off by the military authorities in the Uncompahgre Valley and called the cantonment, in which it was held that by virtue of the treaties made by and between the United States and the Indians, dated October 7, 1863, (13 Stat. 673) March 2, 1868, (15 Stat. 619) and September 18, 1873, said cantonment was properly located on said Indian reservation; that, although the reservation for the cantonment was not in fact declared by the President, yet the land was in good faith legally appropriated, and therefore segregated from the public domain, and that said cantonment should be considered a military reservation, and the land embraced therein should not be considered subject to disposal as other public lands under said act.

"The Secretary of War concurred in the views expressed by the Judge Advocate General. Your office held that the establishment of said cantonment and the occupation thereof by the military authorities, acting under the authority of the Commander in Chief,

the President, must be regarded as legal, and that the reservation must be considered as established by law, so as to exempt the lands embraced therein from entry under the pre-emption laws.

"It is urged that the formal order of the President, declaring said reservation, was not made until after Davis had made his said entry, but that can make no difference, if the land embraced in said entry was in fact included in said cantonment, and the same had been established by law and was in the actual occupation of the military authorities at the time of his said entry, the entry must be considered illegal, so far as it covers land within the limits of the cantonment.

"A careful examination of the record discloses no good reason for disturbing said decision, and it is accordingly affirmed."

In re Davis, 5 L. D. 376.

To the same effect is—

Mather vs. Hackley's Heirs, 19 L. D. 48, 52.

"By the terms of the proviso of the act of March 12, 1860, extending the provisions of the swamp land grant to the State of Minnesota, said grant is not operative as to any lands that prior to selection by the State have been reserved, sold or disposed of pursuant to any law enacted prior to said act."

"It is not necessary to constitute an Indian reservation that a treaty or act of Congress shall specifically describe the lands that are reserved. It is sufficient for such purpose if the lands occupied by the Indians are recognized by the officials of the Government as reserved Indian lands."

In re State of Minnesota, 22 L. D. 388.

"Lands which for a long period of time have been with the knowledge and acquiescense of the Govern-

ment included in the site of a reservoir used as a feeder of a canal in the maintenance and operation of which the Government is interested are not 'unappropriated public lands' and are therefore not subject to the homestead entry."

In re Longnecker, 30 L. D. 186.

To the same effect is—

In re Longnecker (on review) 30 L. D. 611.

And to the same effect is a very recent case—

In re Northern Pacific Railroad, 38 L. D. 496.

The public lands actually occupied and used by the Government as an irrigation canal constructed and operated under the provisions of the Reclamation Act are appropriated by the Government, are not unappropriated public land and are therefore not subject to homestead entry nor to subsequent appropriation by a railroad company. The land is as fully reserved by the actual occupation and use of the Government as it would be if withdrawn under the first form of the Reclamation Act or under any other act for any Goverment purpose.

And the retention in the Government of the title to the works constructed under the Reclamation Act is expressly directed by that act:

"That the Secretary of the Interior is hereby authorized and directed to use the reclamation fund for the operation and maintenance of all reservoirs and irrigation works constructed under the provision of this act: *Provided*, That when the payments required by this act are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the

lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior: *Provided*, That the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress."

Sec. 6, Reclamation Act.

Until otherwise provided by Congress, the only thing which can pass from the Government under any conditions, is the management and operation of the irrigation works and that only after the payments for the major portion of the lands have been made. On this project it is agreed that no part of the cost of construction has been paid. So the Government retains the management and control of all the works as well as the title thereto and will do so for a long time to come.

It is plain that, so far at least as the first lift main canal is concerned, the Government has retained its original fee simple estate and by actual occupation and use for a purpose authorized by law has reserved it from appropriation by individuals or corporations.

The action of the railroad company in taking possession of this land and constructing bridges and fences and railroad grades and other structures thereon is a continuing trespass which can not be excused by the mere statement that the company does not intend to obstruct the flow of the water in the canal.

The Government is entitled to an injunction prohibitory as to future construction and operation and mandatory as to past construction.

It must be borne in mind that no right whatever has been acquired from the United States to go upon or cross these canals either by contract, condemnation or permit of any kind, and even if such a canal were in the possession of a private party, the railroad could not go upon the same and construct across it except by condemnation, contract or purchase of right. That the writ of injunction is a proper remedy for the protection of the Government property in the ditches in question is fully determined.

In this connection we would refer again to the opinion of Justice Brewer in the case of the United States vs. Brighton Ranch Company:

> "We think, too, an action of injunction is the appropriate remedy, and that an action of ejectment would not furnish full protection to the Government. Generally speaking, any encroachment upon the public domain may be restrained or ended by injunction; and in this case it was not the mere fact that the fence is built upon Government land, because such fence operates not only as an entry upon the particular land upon which the fence is built, but also to separate the enclosed lands from the general body of the public domain. So that we think full and adequate remedy can be obtained only in a Court of Equity, which reaches the individual and compels him to abandon and desist from any encroachment on the public property."
>
> 26 Fed. 218.

It is no defense to such occupation of Government property by an unauthorized person that he may allege that he does not intend to materially damage the same.

> "Pecuniary interests sufficient to warrant an appeal to equity are plain enough and it is not material

to the question of jurisdiction—it is not for the Court to inquire—whether those interests are likely to be affected advantageously or disadvantageously by the unlawful conduct which it is sought to enjoin."

U. S. vs. Worlds etc. Exposition, 56 Fed. 630, 639.

"Any trespass upon the public lands of the United States may be enjoined at the suit of the Government."

U. S. vs. Brighton Ranch Co. 25 Fed. 465, 26 Fed. 218.

"An injunction will lie to restrain a threatened trespass consisting of the construction of a building or other structure on the property of another and after such construction a mandatory injunction will lie to compel its removal."

22 La. An. 512.

75 Conn. 662, 55 Atl. 168.

7 Hun. 175.

66 Mich. 331, 33 N. W. 400.

150 Mass. 19, 22 N. E. 73, 5 L. R. A. 209.

167 Pa. St. 296, 31 Atl. 646.

29 Ore. 583, 41 Pac. 926.

21 R. I. 103, 41 Atl. 1001.

94 Md. 462, 51 Atl. 181.

Farrow vs. Vansittart, 1 Rail C. 602.

Barron vs. Korn, 127 N. Y. 224, 27 N. E. 804.

Henderson vs. N. Y. Central R. Co. 78 N. Y. 423.

Williams vs. N. Y. Central R. Co. 16 N. Y. 111.

It will be noticed that if the position of the government is correct, either as to the second, third or fourth part of this argument, the order of the lower court is in error and the Government is entitled to an order of reversal,

with direction to the lower court to enter judgment for the plaintiff in accordance with the prayer of the bill.

Respectfully submitted,

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